WEE TAT TRANSPORT CO

v.

BABA RAZAK & ANOR

HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY JC
[CIVIL SUIT NO: 22-207-2000]
5 DECEMBER 2001

CIVIL PROCEDURE: *Striking out - Writ - Action for damages - Defendants' application to set aside writ granted - Appeal against - Whether to be granted*

CONSTITUTIONAL LAW: *Jurisdiction - High Court - Action for damages - Courts of Judicature Act 1964, s. 23(1) - Whether court has jurisdiction to hear matter*

CONSTITUTIONAL LAW: *Courts - Forum for trial - Forum non conveniens - Defendants seeking matter to be heard in Singapore - Whether onus upon defendants to prove appropriate forum - Whether claim to be heard by court in Singapore*

This was an appeal by the plaintiff against the senior assistant registrar's decision in allowing the defendants to set aside the writ under O. 18 r. 19 of the Rules of the High Court 1980. The dispute between the plaintiff and the defendant arose from an accident which occurred in Singapore and a claim for damages based on the tort of negligence. The defendant sought for the matter to be heard in Singapore to which the plaintiff objected.

The issues before this court were whether it had the jurisdiction to hear the said action and whether the court in Singapore would be the *forum conveniens* to try the action.

Held:

[1] Under para (b) of s. 23(1) of the Courts of Judicature Act 1964, this court has the jurisdiction to hear the plaintiff's action since both the defendants were resident and/or have their place of business in Malaysia.
(p 197 h)

[2] The defendants have discharged the burden of proving that the court in Singapore would be more appropriate to hear the plaintiff's claim. The plaintiff was a Singapore resident and the motor vehicle was registered in Singapore. More importantly, as the accident occurred there, this would involve obtaining evidence from witnesses and reports from Singapore.
(p 199 c-e)

[3] To have the matter tried in Malaysia would be inappropriate in light of O. 38 r. 18(2) of the Rules of the High Court as a writ of subpeona could not be served on any person outside Malaysia. Thus, the plaintiff might not be able to secure attendance of witnesses residing in Singapore as they cannot be compelled to give evidence here. (p 199 g-h)

[Appeal dismissed.]

Case(s) referred to:

American Express Bank Ltd v. Mohamed Toufic Al-Ozeir & Anor [1995] 1 CLJ 273 ***(foll)***

Lam Kok Trading Co Pte Ltd & Anor v. Yorkshire Switchgear and Engineering Co Ltd [1976] 1 MLJ 239 ***(refd)***

Malayan Banking Berhad v. International Tin Council & Another Case [1989] 2 CLJ 961; [1989] 1 CLJ (Rep) 87 ***(refd)***

Societe du Gaz de Paris v. Societe Anonyme de Navigation les Armateurs Francais [1926] SC (HL) 13 ***(refd)***

Spiliada Maritime Corp v. Consulax Ltd (The Spiliada) [1986] 3 All ER 843 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 23(1)(b)

Rules of the High Court 1980, O. 11 r. 1, O. 18 r. 19(1)(a), O. 38 r. 18(2)

For the plaintiff - K Meneka; M/s Nijar Kumar Netto & Partners
For the defendant - Ibrahim Hashim; M/s Hassan Ibrahim & Co

Reported by M Maheswaran

JUDGMENT

Syed Ahmad Helmy JC:

The appeal herein in encl. 18 is against the decision of the penolong kanan pendaftar allowing the defendant's application to set aside the writ under O. 18 r. 19(1) of the Rules of the High Court 1980.

It should be observed that though the defendant did not specifically allude to any specific paragraph of the four sub-paragraphs of r. 19(1) of O. 18, nevertheless by not filling any affidavit the court can safely assume that the defendant's application is centered on sub-para. (a) of r. 19(1) of O. 18 where no affidavit evidence is required and my decision herein is proceeded on the premise aforesaid.

The issues for determination herein is two-fold:

1. Whether this court has jurisdiction to hear the action herein which is for general and special damages based on the tort of negligence.

2. Whether this court or the Singapore court is the *forum conveniens* to try the action herein.

As the issues of jurisdiction and *forum non conveniens* are distinct and separate I shall approach the issue of jurisdiction first.

Under the Courts of Judicature Act 1964 (hereinafter called the CJA) the civil jurisdiction of the High Court is specifically spelt out by s. 23(1) thereof which reads:

> Section 23 - Civil Jurisdiction
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> (1) Subject to the limitations contained in art. 128 of the Constitution of the High Court shall have jurisdiction to try all civil proceedings where:
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> a) the cause of action arose, or
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> b) the defendant or one of several defendants resides or has his place of business, or
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> c) the facts on which the proceedings are based exist or are alleged to have occurred, or
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> d) any land the ownership of which is disputed is situated,

within the local jurisdiction of the court and notwithstanding anything contained in this section in any case where all parties consent in writing witness the local jurisdiction of the other High Court.

The four paragraphs aforesaid are to be read disjunctively - *Lam Kok Trading Co Pte Ltd & Anor v. Yorkshire Switchgear and Engineering Co Ltd* [1976] 1 MLJ 239; *Malayan Banking Berhad v. International Tin Council & Another Case* [1989] 2 CLJ 961; [1989] 1 CLJ (Rep) 87; with the end result that the fulfillment of any one of the paragraphs is sufficient to confer jurisdiction on the court.

By reason of the statutory jurisdiction aforesaid and in the context of the factual matrix herein since both the defendants are resident and/or have their place of business in Malaysia para. (b) of s. 23(1) of the CJA is satisfied so as to confer jurisdiction on this court to entertain the plaintiff's action herein.

However the fact that the court is conferred with jurisdiction is not the end of the matter, as another vital principle has to be considered namely the discretion to entertain the action based on the doctrine of *forum non conveniens.*

The defendant herein by advancing the *forum non conveniens* issue is urging this court to refrain from exercising its jurisdiction on the ground that the trial in this forum is manifestly inconvenient because the action has little connection with the forum herein, and the evidence needed for trial is situated elsewhere. In essence the defendant is trying to persuade the court that the Singapore court is a more appropriate forum in which the plaintiff's claim ought to be brought.

The doctrine it should be emphasised was evolved to confer the court with a discretion to decline jurisdiction where the forum selected by the plaintiff is inappropriate. The rationale is to find that forum which is more suitable for the ends of justice, and is preferable because pursuit of the litigation in that forum is more likely to secure the ends of justice - Lord Sumner in *Societe du Gaz de Paris v. Societe Anonyme de Navigation les Armateurs Francais* [1926] SC (HL) 13 at p. 22.

The doctrine found full acceptance by the House of Lords in the case of *Spiliada Maritime Corp v. Consulax Ltd (The Spiliada)* [1986] 3 All ER 843. Lord Goff in *The Spiliada* restated the law to the effect that a stay would be granted "where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, in which the case may be tried more suitably for the interest of all the parties and the ends of justice."

Our Supreme Court in *American Express Bank Ltd v. Mohamed Toufic Al-Ozeir & Anor* [1995] 1 CLJ 273 approved and adopted the restatement of the principle in *The Spiliada* and on the question of onus was of the view that it is dependent on which party initiated the application - thus where a defendant applies for stay of proceedings, the defendant would have to satisfy the court that "some other forum is more appropriate." Where on the other hand, leave to issue and serve out of jurisdiction a notice of writ of summons under O. 11 r. 1 Rules of the High Court 1980 is involved, the plaintiff would have to satisfy the court that by comparison, the Malaysian court is the most appropriate forum to try the action.

The Supreme Court also opined that irrespective of the nature of the application another important factor which the court ought to consider in approaching the *forum non-conveniens* question is the factor whether it would be unjust to the plaintiff to confine him to remedies elsewhere and in

evaluating this factor the court ought to consider whether any particular forum is one with which the action has the most real and substantial connection. If after reviewing the fact with which the action has the most real and substantial connection the court concludes that there is some other available forum which *prima facie* is clearly more appropriate for the trial of the action the burden resting on the defendant seeking stay would be satisfied.

Since it is the defendants who are seeking some other available forum more appropriate for the trial the burden rests on them and the question arises whether they have discharged the burden?

Upon evaluating the facts herein I am of the considered view that the defendants herein have discharged the burden of proving that the Singapore courts are a more appropriate forum in which the plaintiff's claim ought to be brought. The plaintiff's counsel in no uncertain terms in her submission conceded that the plaintiff is resident in Singapore and is registered in Singapore, the motor vehicle was registered in Singapore and more importantly the accident occurred in Singapore. Clearly then, by the plaintiff's concession and pleadings, the Singapore courts would be the forum with which the action has the most real and substantial connection.

Furthermore since the accident occurred in Singapore invariably witnesses in the form of actual witnesses to the accident, police reports, surveyor's report and workshop repairers would be witnesses in Singapore and hence it cannot be denied that it is a more suitable and appropriate forum bearing in mind that the word "*conveniens"* in *forum non conveniens*, in the words of Lord Goff in *The Spiliada* meant suitability or appropriateness of the relevant jurisdiction and not one of convenience.

Again the unsuitability and inappropriateness of the Malaysian forum becomes evident against the background of the Rules of the High Court 1980 and in particular to the provisions O. 38 r. 18(2) thereof.

Order 38 r. 18(2) Rules of the High Court 1980 is crystal clear in its wording in that a writ of subpoena shall not be served on any person outside the jurisdiction. The usage of the word "shall" imposes a strict prohibition and hence it would be an exercise in futility for the plaintiff in securing the attendance of witnesses from Singapore as they cannot be compelled to give evidence herein which again reinforces the suitability and appropriateness of the Singapore forum which is in a position to secure the attendance of witnesses.

a For the reasons aforesaid the defendants have successfully persuaded me to exercise my discretion in ruling that this court is not the *forum conveniens* for the trial of the action herein and in the interests of all parties concerned and for the ends of justice the Singapore courts are the more suitable and appropriate forum.

b In the circumstances I hereby dismiss the plaintiff's appeal in encl. 18 with costs.

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